16-6316

OCTOBER TERM, 2016

In the Supreme Court of the United States

MICHAEL DAMON RIPPO, Petitioner,

v.

TIMOTHY FILSON, Warden, Respondent.

On Petition for Writ of Certiorari to the Nevada Supreme Court

ORIGINAL

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Supreme Court, U.S.
FILED
OCT 0 3 2016
OFFICE OF THE CLERK

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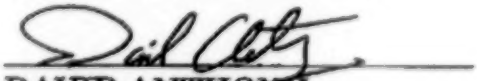
Pursuant to Supreme Court Rule 39.1, Petitioner Michael Damon Rippo requests leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Rippo has been granted leave to do so in state court and federal court. In state court, counsel were appointed to represent Rippo at trial and on direct appeal. In 2008, the Federal Public Defender for the District of Nevada ("FPD") was appointed to represent Mr. Rippo during state post-conviction habeas proceedings. In the United States District Court, the FPD was appointed to represent Rippo in the district court. A copy of the order of the state court granting Rippo's motion for appointment of counsel is appended to this motion as Exhibit 1.

Dated this 3rd day of October 2016.

Respectfully submitted,



DAVID ANTHONY
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EXHIBIT 1

EXHIBIT 1

ORIGINAL

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FILED
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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL DAMON RIPPO, Petitioner, vs. E. K. McDANIEL, Warden, and CATHERIN CORTEZ-MASTO, Attorney General of the State of Nevada, Respondents.	Case No. C106784 Dept. No. XX Date of Hearing: _____ Time of Hearing: _____ (Death Penalty Case)

ORDER APPOINTING COUNSEL

Petitioner, Michael Rippo, in his Motion for Appointment of Counsel, requested his current counsel, the Office of the Federal Public Defender, represent him in this habeas corpus proceeding. On February 11, 2008, the matter came on for hearing. Good cause appearing,

IT IS HEREBY ORDERED that the Office of the Federal Public Defender through David Anthony, Assistant Federal Public Defender, is appointed to represent Mr. Rippo during the

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pendency of this post-conviction habeas corpus proceeding.

DATED this 11th day of February 2008.

District Judge

Submitted by:
FRANNY A. FORSMAN
Federal Public Defender

DAVID ANTHONY
Assistant Federal Public Defender

C106784
O Appt Counsel.

No.

OCTOBER TERM, 2016

In the Supreme Court of the United States

MICHAEL DAMON RIPPO, Petitioner,

v.

TIMOTHY FILSON, Warden, Respondent.

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QUESTIONS PRESENTED

(Capital Case)

In this case, the trial judge was the target of a federal bribery investigation in which the prosecutor's office and state law enforcement participated. When defense counsel moved to recuse the judge at trial, the judge falsely represented that he did not know whether state law enforcement was involved in the investigation, and did not correct the prosecutor's false representations that the Clark County District Attorney's Office had no involvement in the federal investigation. The trial judge also failed to disclose that one of the State's witnesses in Rippo's case was a material part of the bribery investigation because the judge had fixed a case on behalf of the witness. Rippo was therefore deprived of a factual basis for his recusal motion throughout the prior state proceedings until the filing of the instant petition for writ of habeas corpus.

The question presented is:

1. Did the trial judge's failure to recuse himself from Rippo's capital trial violate the Due Process Clause?

LIST OF PARTIES

Petitioner Michael Damon Rippo is an inmate at Ely State Prison. Respondent Adam Paul Laxalt is the Attorney General of the State of Nevada. Respondent Timothy Filson is the warden of the Ely State Prison.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 3

A. Relevant Facts Adduced in the Trial Proceedings: The District Attorney's Office and State Law Enforcement Were Not Involved in the Federal Criminal Investigation of the Trial Judge. 3

B. Relevant Facts Proffered in the Instant Habeas Proceeding: The District Attorney's Office and State Law Enforcement Were Involved in the Federal Criminal Investigation of the Trial Judge. 8

C. The Federal Bribery Investigation Against the Trial Judge Involved Fixing Cases for Alleged Mafia Associates, Including Denny Mason 13

D. The State Courts Ignored the Import of the New Evidence by Holding that Rippo's Judicial Bias Claim Had Been Previously Raised and Rejected. 14

REASONS FOR GRANTING THE PETITION 16

A. Certiorari Review is Warranted Due to the Nevada Supreme Court's Egregious Failure to Apply this Court's Settled Law to a Capital Case Involving Extreme and Unusual Facts that Created an Unacceptable Risk of Judicial Bias. 16

B. The Nevada Supreme Court Failed to Properly Apply the Appearance of Impropriety Standard Because it Misapprehended the Nature of Rippo's Judicial Bias Claim As Limited to Compensatory Bias. 20

CONCLUSION 26

TABLE OF AUTHORITIES

Federal Cases

Bracy v. Gramley, 520 U.S. 899 (1997) ..... *passim*
Bracy v. Schomig, 286 F.3d 406 (7th Cir. 2002) 22
Brooks v. Dretke, 418 F.3d 430 (5th Cir. 2005) 23
Cartalino v. Washington, 122 F.3d 8 (7th Cir. 1997) 25
Collins v. Wellborn, 520 U.S. 1272 (1997) 19
Cone v. Bell, 556 U.S. 449 (2009) 17, 20
Flowers v. Mississippi, 136 S. Ct. 2157 (2016) 19
Foster v. Chatman, 136 S. Ct. 1737 (2016) 17, 19
In re Murchison, 349 U.S. 133 (1955) 25
Johnson v. Mississippi, 403 U.S. 212 (1971) 24
Liljeberg v. Health Servs. Acq. Corp., 486 U.S. 847 (1988) 19
Smith v. Cain, 132 S. Ct. 627 (2012) 17
Tumey v. Ohio, 273 U.S. 510 (1927) 23, 25
United States v. Lanier, 520 U.S. 259 (1997) 2
Wearry v. Cain, 136 S. Ct. 1002 (2016) 17
Wellons v. Hall, 558 U.S. 220 (2010)..... *passim*
Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) ..... *passim*

Federal Statutes

28 U.S.C. § 1257(a) (2012) 2

State Cases

Crump v. Demosthenes, 934 P.2d 247 (Nev. 1997) 20
In Interest of McFall, 617 A.2d 707 (Pa. 1992) ..... *passim*
Rippo v. State, 146 P.3d 279 (Nev. 2006) 8
Rippo v. State, 368 P.3d 729 (Nev. 2016) ..... *passim*
Rippo v. State, 946 P.2d 1017 (Nev. 1997) 2, 7
Whitehead v. Nevada Comm'n on Judicial Discipline, 878 P.2d 913 (Nev. 1994) .. 24

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Damon Rippo requests this Court grant his petition for writ of certiorari and vacate his convictions and death sentences in a capital case involving extreme and unusual factual circumstances that required the recusal of the trial judge. At the time the trial judge adjudicated the case, he knew the State was involved in a federal criminal investigation alleging that the judge took bribes from litigants. Representatives of the State of Nevada, specifically, the Clark County District Attorney's Office and state law enforcement, were involved with the federal authorities in a sting operation which was intended to route a criminal case to the judge's department to see if the judge would accept a bribe. The District Attorney's Office was also conducting its own investigation to see if the judge had accepted bribes in any other criminal cases. One of the individuals who the judge was accused of fixing cases for was Denny Mason, a witness for the state in the instant case and the victim of the stolen credit card offense for which Rippo was convicted. Rippo requests that this Court grant his petition for writ of certiorari because it is clear that the judge's presence in the case carried an unacceptable risk of bias and recusal was constitutionally mandated.

"The facts of this case are, happily, not the stuff of typical judicial-disqualification disputes." *Bracy v. Gramley*, 520 U.S. 899 (1997). Rippo has not been able to find any case where a sitting trial judge was being criminally investigated by one of the parties before him in a case.[1] The absence of direct

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[1] The circumstances before the Pennsylvania Supreme Court in *In Interest of McFall*, 617 A.2d 707 (Pa. 1992), are analogous in that a judge was caught accepting a gift from a litigant and subsequently became an informant from the FBI and the judge entered into a cooperation agreement stating that the federal authorities would make the judge's cooperation known to other entities, including, presumably, the state prosecutor's office. *Id.* at 713. In Rippo's case, the judge knew that the prosecutor's office was involved in the federal investigation at the time he presided over Rippo's case.

authority on this point is precisely because no one would consider such a thing permissible: "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citation omitted). As this Court has noted, "[t]he easiest cases don't even arise." *Id.* (citation and internal quotations omitted). This is one of those easy cases: a trial judge cannot maintain a constitutional level of impartiality in a case in which he is being criminally investigated by one of the parties and where one of the state's witnesses was involved in one of the cases that was alleged to have been fixed by the judge.

Rippo requests that this Court grant his petition for writ of certiorari to correct this fundamental miscarriage of justice.

OPINIONS BELOW

The decision of the Nevada Supreme Court, affirming the denial of Rippo's second state post-conviction petition for writ of habeas corpus is published and is found at *Rippo v. State* 368 P.3d 729 (Nev. 2016). App.001-66. The Nevada Supreme Court's order denying the petition for rehearing is unreported and appears at App. 091-94. The Nevada Supreme Court's 1997 opinion affirming the judgment of conviction is reported at *Rippo v. State*, 946 P.2d 1017 (Nev. 1997). App. 067-90.

JURISDICTION

The Nevada Supreme Court's order of affirmance was issued on February 25, 2016, and a timely petition for rehearing was denied on May 19, 2016. On August 9, 2016, Justice Kennedy extended the time to file a petition for writ of certiorari until and including October 3, 2016. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Michael Damon Rippo was convicted of two counts of first-degree murder and robbery for the deaths of Denise Lizzi and Lauri Jacobson. The state's pathologist testified that Lizzi's cause of death was consistent with manual and ligature strangulation and that Jacobson's death was the result of asphyxiation due to manual strangulation. Rippo was also convicted of unauthorized use of a credit card taken from the crime scene belonging to Denny Mason, Lizzi's boyfriend. Rippo was sentenced to death by a jury for both murders. On May 17, 1996, judgment of conviction was entered, sentencing Rippo to 15 years for the robbery conviction and 10 years (to run consecutively) for the credit card offense.

A. Relevant Facts Adduced in the Trial Proceedings: The District Attorney's Office and State Law Enforcement Were Not Involved in the Federal Criminal Investigation of the Trial Judge.

During the trial, defense counsel moved to recuse the trial court, the Honorable Gerard Bongiovanni, on the grounds that the judge was the subject of a federal criminal investigation alleging that the judge took bribes from litigants in the cases before him. During argument on the motion, the parties discussed whether the prosecutor's office and state law enforcement were involved in the criminal investigation. In response, the prosecutor falsely represented that the Clark County District Attorney's Office was not involved in any investigation of the judge, and the trial judge falsely represented that he was unaware whether state law enforcement were involved in the investigation. The trial judge did not disclose any information

regarding any relationship he may have had with Denny Mason, the victim of the stolen credit card offense and a witness for the state.

On February 5, 1996, based on information recently published in the local newspaper, trial counsel made a motion to disqualify the trial court on the grounds that the judge faced an imminent indictment in federal court, and that "the State is – obviously has to cooperate with the feds in reviewing cases of alleged bias, that there may be pressure placed on the Court to show favor to the State." App. 150-151; App. 164-165. When trial counsel stated that they had "no idea what's going on in your case other than the fact the . . .," the trial court interrupted and said "Neither do I." *Id.* at 151-152. The court represented, "I know as much as you do, what the newspaper writes." *Id.* at 152.

The prosecutor stated that he had discussed the matter with the Clark County District Attorney Stewart Bell and Chief Deputy District Attorney Charles Thompson and asked them: "Do you know what's going on? And they said not really . . . ." *Id.* at 153. He explained that Bell disclosed that the extent of his knowledge about the case was limited to "when the search warrant occurred, that the feds called him and – just as a sort of courtesy call . . . ." *Id.* The prosecutor represented that Bell specifically instructed the federal authorities not to tell him anything about the case because of his role as a District Attorney before a sitting judge. *See id.*

The prosecutor represented that the Clark County District Attorney's Office had nothing to do with the federal investigation of the trial judge:

> And so, I think the major thing that I want to point out, it is two different governmental entities. The State of Nevada, in terms of the District Attorney's Office at least, and through Stu [the District Attorney], I can speak for our office, we have nothing to do with any sort of – what we're reading about in the newspapers, because that's all I know, is the same thing that you read.

> We don't have any agreements with [the federal authorities], any working arrangements with them. We don't have anything with them and don't anticipate having any.
>
> And so, I can't see that the State of Nevada, in here before you now, would have any emphasis one way or the other on any rulings or decisions that you might make. In fact, we want to make it abundantly clear that there is nothing like that going on. And we just – we want to say what we believe is true anyway, which is that you are not going to take sides.

App. 154. The prosecutor further explained, "I can say as an officer of the Court, we are not – and that is through Stu Bell, and if you want further words out of him, he will be happy to give them – but we just don't think – we just don't' think that there is anything to this motion. . . ." App. 155. The prosecutor again represented, "I learned from my boss this morning, Stu Bell, that he, nor any other person in our office, to his knowledge, has had contact." App. 157.

The trial judge represented that he was unaware whether the Las Vegas Metropolitan Police Department ("Metro") was involved in the federal investigation:

> The Court: Well, would there be any difference if Metro conducted an investigation? I don't know. I heard a rumor to that effect, but I don't know if it's true.
>
> Mr. Wolfson: It's very common for Metro's intelligence –
>
> The Court: I think I read something in the paper to that effect in one of those articles.
>
> Mr. Wolfson: It's very common for Metro's intelligence units to work with federal law enforcement agencies in a joint effort. I don't know whether they are doing that in this case or not.
>
> The Court: I don't know either.

App. 157. The trial court denied the defense's motion for recusal. *See id.*

After his conviction, Rippo filed a motion for new trial which asserted that the trial judge failed to disclose his business relationship with Denny Mason's business partner, Ben Spano, who was purportedly a member of the La Cosa Nostra in Buffalo, New York. App. 171-176. Rippo argued that disclosure of that information, along with the fact of the federal criminal investigation, should have required the recusal of the trial court. App. 171-176. According to the motion,

> If the defense had known about the connection between the judge, Denny Mason, and organized crime, we would have asked for a recusal and considered calling the judge as a witness. Also, if the judge had disclosed this mob connection, we could have had additional information to question Mr. Mason.

App. 173-174.

In its opposition to the motion for new trial, the state argued that Rippo's motion should be denied based on the trial judge's representations on the record at trial. App. 177-182. Specifically, the state referred to the judge's representations "stating emphatically that the Rippo case and the pending federal investigation against the court were completely unrelated." App. 178. The state argued that Rippo's motion "has not presented one iota of evidence which contradicts the previous declarations of Judge Bongiovanni made on the record in his denial of the motion for recusal." App. 179. The Honorable James Brennan, who was substituted for Judge Bongiovanni after his indictment, heard arguments on Rippo's motion. The trial court denied Rippo's motion as lacking any factual support. App. 186.

On direct appeal, Rippo raised a claim of judicial bias and argued that the trial court should have recused itself. He also argued that the trial court erred in denying his motion for an evidentiary hearing to determine "whether there was any involvement by the District Attorney's Office in the investigation and indictment that should have been revealed on the record before Judge Bongiovanni was allowed to

proceed with the capital trial." App. 267. Rippo also alleged that the District Attorney's Office was a necessary participant in a sting operation against the judge which "involved a manipulation of the random assignment of cases so that particular cases would track to his department. If the office of the District Attorney were involved in any aspect of this situation then the representations put on the record during trial were inaccurate." App. 285. Appeal counsel did not include any citation to the record to support his assertions, presumably because recent news reports only vaguely hinted at the time the Clark County District Attorney's Office might be involved in the sting operation.

In its answering brief, the state argued that the District Attorney's Office had no involvement in the investigation of the trial court and that judge court would not have had any reason to be concerned about the prosecutor's office:

> the State admittedly had nothing to do with the federal probe. [citation] The State was not in a position to do anything to Judge Bongiovanni. The judge had no reason to worry about 'what the State was going to do to him. Completely different entities were involved.'

App. 277. The state reiterated the representations of the prosecutor at trial that the District Attorney's only involvement in the case against the judge was limited to notice after the fact regarding the execution of the search warrant on his home. *Id.*

The Nevada Supreme Court affirmed the convictions, denying both the recusal motion and the motion for new trial on the grounds that there was no factual support for any of Rippo's assertions. *Rippo v. State*, 946 P.2d 1017, 1023-24 (Nev. 1997). The court also denied Rippo's request for a remand for an evidentiary hearing on his allegations of judicial bias. App. 067-90.

B. Relevant Facts Proffered in the Instant Habeas Proceeding: The District Attorney's Office and State Law Enforcement Were Involved in the Federal Criminal Investigation of the Trial Judge.

The instant proceeding arises from the filing of Rippo's second state post-conviction petition.[2] In this proceeding, Rippo proffered overwhelming evidence that the Clark County District Attorney's Office and state law enforcement were involved in the federal criminal investigation, and that the office was also conducting an investigation of the judge's cases to determine whether he had taken bribes from litigants.

Contrary to the state's representations at trial, the Clark County District Attorney's Office and the Chief Judge of the Eighth Judicial District Court were essential participants in the federal sting operation to bait Judge Bongiovanni into taking bribes from the litigants before him. Specifically, a "supervising attorney" in the Clark County District Attorney's Office obtained a phony indictment in state court against Terry Salem, a government informant, and worked with the Chief Judge of the court to manipulate the random assignment system to send Salem's case to Judge Bongiovanni's department to see if the judge would accept a bribe from Salem. In the United States Attorney's trial memorandum in Bongiovanni's case, it expressly noted, "With the assistance of the District Attorney's office, and as part of the undercover operation, Salem was indicted by a state grand jury on December 15, 1994 for theft charges relating to the California Federal Bank fraud, and the case was assigned to Bongiovanni." App. 397.

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[2] Rippo filed a timely first state post-conviction petition that was denied by the habeas court, and the denial was affirmed by the Nevada Supreme Court in a sharply divided 4-3 decision relating to the validity of the death sentences. *Rippo v. State*, 146 P.3d 279 (Nev. 2006). That proceeding does not raise any issues that are relevant to Rippo's claim of judicial bias.

A defense motion filed by Bongiovanni's attorneys specifically sought dismissal of the indictment on the ground that the government's sting operation constituted outrageous government conduct. App. 232-260. In that motion, the defense cited to the affidavit of FBI case agent Jerry Hanford wherein Agent Hanford represented that "a supervisory attorney with the Clark County District Attorney's Office has agreed to present a state Grand Jury with an Indictment charging SALEM with forgery and obtaining money under false pretenses in regard to the fraud committed against California Federal Bank. Under the state system, the District Attorney's Office must send the target a notice of his target status and invite him to appear before the Grand Jury." App. 236-237. Agent Hanford further explained that the same supervising attorney was necessary to manipulate the random assignment process to ensure the case was sent to Judge Bongiovanni's department: "In any event, the deputy district attorney who is cooperating in this investigation said that he can ensure that the case is assigned to Bongiovanni if Flangas and/or Bongiovanni do not do it themselves, or the case is not randomly assigned to him, without Bongiovanni being alerted to that fact." App. 237.

At Bongiovanni's criminal trials, Terry Salem, Metro Detective John Nicholson, and Special Agent Hanford all testified about the roles of the Clark County District Attorney's Office and state law enforcement in the investigation of Bongiovanni. Salem testified that he became a government informant and it was his understanding that a phony indictment would be presented against him in state court and routed to Bongiovanni's department. App. 436-448, App. 453-454, 461, App. 484-488. Metro police detective John Nicholson testified that he was involved in every aspect of the criminal investigation of Judge Bongiovanni. Nicholson testified that he was involved in the surveillance operation wherein Terry Salem handed the bribe money to Paul Dottore – the alleged intermediary between Salem and Bongiovanni –

also became a government witness against Bongiovanni at his criminal trials. App. 458-459. Nicholson was present during all witness interviews. App. 479. Nicholson testified that he and Mike Abbot from the Nevada Division of Investigation ("NDI") were personally involved in the execution of a search warrant on Bongiovanni's property in October of 1995. App. 461-476. Nicholson was the first person to walk into Bongiovanni's residence wearing his yellow police jacket, clearly identifying him as a Metro police officer. App. 480, 517-518. Also, Nicholson was the first person to make contact with Bongiovanni in his residence and was the person who questioned him about the bribe money. App. 476, 478, 513. Finally, Nicholson was present when the authorities pulled over Paul Dottore after he left Bongiovanni's home. App. 464-466. Special Agent Hanford corroborated all of Detective Nicholson's testimony regarding state law enforcement's involvement in the investigation of Judge Bongiovanni. App. 484, App. 495-496, 503.

When testifying in his defense, Bongiovanni admitted that he had actual knowledge at the time of the search warrant's execution that Metro was involved in the federal investigation. Bongiovanni testified that he saw Nicholson as the first person entering his home wearing a Metro jacket. App. 513 ("the first person I saw was Detective Nicholson, and like they stated they were all in their FBI garbs and Metro had his raincoat on with the letters, and as I turned the corner there was Nicholson, he says I have a warrant here."). App. 513. At his second trial, Bongiovanni testified that Detective Nicholson was wearing a jacket that "had 'Metro' or 'Las Vegas Police Department'" inscribed on it. App. 518. Bongiovanni testified, "Nicholson was the one that was very, very loud. I'm not saying it was like a drug bust, but he was very loud and he put the fear of God in my kids, I'll tell you." App. 527, 530 ("Nicholson was right in my ear, I mean – and he could talk loud and it seemed like screaming to me, shouting."), App. 531 ("all's I could hear was Nicholson

shouting in my ear."). Bongiovanni also testified that Nicholson was the officer who obtained the marked bribe money from his back pants pocket. *See* App. 531-542. Therefore, Bongiovanni's representations at Rippo's trial that he did not know whether Metro was involved in the investigation were false.

Bongiovanni's actions directly before Mr. Rippo's trial demonstrate that he was also aware of the involvement of the Clark County District Attorney's Office in the federal investigation. After the execution of the search warrant on October 17, 1995, Bongiovanni hired attorney Tom Pitaro, who interviewed Paul Dottore, the government informant and alleged intermediary between Salem and Bongiovanni, and obtained information about the bribery investigation. App. 354. Less than a month later, on November 7, 1995, Judge Bongiovanni disqualified himself from adjudicating Salem's criminal case to avoid the appearance of impropriety and implied bias. App. 133. Contained within the district court case file for Salem was an indictment that was sought by Ulrich Smith, a deputy district attorney with the Clark County District Attorney's Office. App. 135-141. The indictment listed the lead witness against Salem as Detective John Nicholson from Metro Intelligence. *See id.* Also contained within the district court file was the grand jury transcript showing that the District Attorney's Office presented the testimony of Detective Nicholson as the lead witness against Salem. On January 10, 1996, the District Attorney's Office dismissed the state criminal case against Salem. App. 133-134. This sequence of events demonstrates that Judge Bongiovanni did know about the Clark County District Attorney's role in the sting operation directly before Rippo's trial, beginning on January 30, 1996.

Rippo also presented evidence that the Clark County District Attorney's Office was conducting its own investigation of Judge Bongiovanni's cases at the time of Mr. Rippo's trial. At the time, media reports depicted Bongiovanni as a "liberal" who was

soft on criminals. App. 168-170. According to the article, "[t]he district attorney's office is reviewing its cases before Bongiovanni to determine if the judge's alleged biases affected the prosecution." *Id.* The same article stated that the District Attorney's Office considered Bongiovanni to be a "liberal" when it came to judging: "'We probably didn't enjoy trying cases in his department as much as we did others,' said Deputy District Attorney Chuck Thompson . . . . 'He wasn't our first choice to try a close case in front of.'" *Id.* Another article stated, "Clark County District Attorney J. Charles Thompson said Thursday the office is reviewing the case of Kevin Brown, the 30-year-old son of Las Vegas U.S. Marshal Service chief Herb Brown." App. 168. No information regarding the District Attorney's internal investigation of Bongiovanni has ever been disclosed.

The sequence of events demonstrates that the trial court would have had reason to be concerned about the state's involvement in the federal criminal investigation at the time he presided over Rippo's capital trial. Bongiovanni became aware of the nature of the federal investigation on October 17, 1995, when the search warrant was executed on his home. Bongiovanni's attorney immediately began investigating the case and obtained inside information that was not known to the general public about the investigation. App. 352, App. 327-328. And then Bongiovanni apparently acted on that inside information by disqualifying himself from Salem's case on November 7, 1995. Rippo alleges on information and belief that the federal grand jury convened in December of 1995. According to newspaper accounts, Bongiovanni had even been offered a guilty plea by the federal authorities directly before Rippo's trial. Jeff German, *Bongiovanni Braces for Tough Fight Over Corruption Charges*, Las Vegas Sun, April 18, 1996, at 1A. In addition, the District Attorney's Office, at the direction of J. Charles Thompson, the same person consulted by the prosecutor who said the District Attorney's Office knew nothing about the

federal investigation, was conducting an investigation of criminal cases that had come before Bongiovanni.

C. The Federal Bribery Investigation Against the Trial Judge Involved Fixing Cases for Alleged Mafia Associates, Including Denny Mason

Rippo also proffered evidence in the instant habeas proceeding showing that there was a direct relationship between the federal criminal investigation of the trial judge and the state's victim witness, Denny Mason. Mason testified at trial that he was the owner of the credit card and motor vehicle that were taken from the victim, Denise Lizzi, and purportedly used by Rippo. Rippo proffered evidence showing that the bribery allegations against the judge included wiretap evidence that alleged mafia figures contacted the court and sought and obtained benefits in a case involving Denny Mason as the defendant.

A material portion of the federal criminal allegations against Bongiovanni included the fact that the trial judge performed favors for Ben Spano, an alleged member of the mafia, in the form of own recognizance releases and fixing traffic tickets for Spano and his associates, including Denny Mason.[1] Specifically, the

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[1]During Agent Hanford's testimony at Judge Bongiovanni's trial, the government introduced Exhibit 113, which was a recording of Ben Spano's phone call to Judge Bongiovanni's home. App. 492. The government also introduced Exhibit 114, which comprised seven recorded phone conversations relating to Bongiovanni's purported favors for Spano. App. 492-493. Bongiovanni testified that the own-recognizance release that he obtained for Spano's son was legitimate because he believed that Spano would make his court appearances. App. 509. On cross-examination, Bongiovanni admitted that he knew Spano: "Q He's a friend like Ben Spano was a friend, right? A – but we weren't – no, no. I knew Ben Spano a little better than Mr. O'Neill . . . .").

Spano called Bongiovanni on December 29, 1994, at his home and this phone call was intercepted by the FBI. App. 199. Bongiovanni's secretary, Diane Woofter, called Spano on February 13, 1995, and this phone call was also intercepted by the FBI. App. 202. Bongiovanni's defense counsel filed a motion mentioning the allegations from Agent Hanford's affidavit that Spano was a member of the Buffalo La Cosa Nostra, which operated companies in Las Vegas. App. 227.

indictment against Bongiovanni alleged that he improperly granted benefits to Spano in criminal cases. App. 307-315. Ben Spano was also specifically referenced in the United States Attorney's trial memorandum. App. 396. One of the individuals for whom Spano obtained benefits from Bongiovanni was Denny Mason. Specifically, an authorization for a wiretap order, dated October 11, 1995, included the memorialization of a phone call from Spano to Judge Bongiovanni's chambers. App. 396-397. In the conversation, "Ben Spano (Buffalo LCN ["La Cosa Nostra"] associate called Bongiovanni re[garding] his brother in Henderson jail; guy OR'd; also talked to Woofter re[garding] Denny Mason's ticket)." *Id.* Rippo further alleged on information and belief that Spano personally introduced Mason to Bongiovanni at a social event.

At Rippo's trial, Bongiovanni falsely represented that there was no connection between the federal investigation and the instant case. App. 164.

D. The State Courts Ignored the Import of the New Evidence by Holding that Rippo's Judicial Bias Claim Had Been Previously Raised and Rejected.

After discovering the evidence above pertaining to Bongiovanni's criminal case, Rippo filed the instant successive state petition on Janury 25, 2008. The State moved to dismiss the petition, and Rippo opposed the motion and sought formal discovery and an evidentiary hearing on his claim of judicial bias. During argument on the State's motion, counsel for the State acknowledged the overwhelming evidence proffered by Rippo that the State was involved in the sting operation against the judge. Counsel for the State acknowledged that the district attorney's office "are the only ones that can file a case [against Salem, the government informant], so I can see how this might have come about." App. 555. At the same time, the representative for the State made it clear that he did not make any attempt to determine what facts

were known to his office regarding its role in the investigation and prosecution of the judge at the time of Rippo's trial:

> I did not intend to admit anything in any brief that I filed in this case. I don't know what happened. I wasn't there. I wasn't part of the proceeding. I'm simply looking at the documents the Federal Public Defender has provided which indicates there was a conversation with a deputy of our office and that there – that's the only place I'm getting that is from their own documents. So I don't intend to say that we were involved. I simply don't know.

App. 555.

The state habeas court granted the State's motion to dismiss and denied Rippo's motions for discovery and an evidentiary hearing. In its findings of fact and conclusions of law that were drafted by the State, the court held that Rippo's claim was procedurally defaulted because defense counsel purportedly knew at the time of trial that the State was involved in the criminal investigation of the trial judge:

> The record shows that more than a decade ago, Rippo's trial counsel knew and alleged that the State was involved in the Federal sting operation by indicting Terry Salem and manipulating the random assignment of the case and also that Bongiovanni failed to disclose a prior relationship with witness Denny Mason who was the business partner of reputed Buffalo mob associate Ben Spano.

App. 563.[3] As explained above, the record before the state court on direct appeal showed that the District Attorney's Office and state law enforcement were not involved in the investigation of the trial judge, and there was no evidence connecting state victim witness Denny Mason to the criminal investigation.

The Nevada Supreme Court affirmed the habeas court's denial of Rippo's petition, albeit for different reasons. The court characterized Rippo's claim of judicial bias as being predicated on the fact that the trial judge

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[3] Rippo filed a formal objection to this proposed finding on the ground that it was factually baseless.

> (1) was the subject of a federal investigation at the time of trial, (2) knew that the Clark County District Attorney's Office and/or the Las Vegas Metropolitan Police Department (Metro) were involved in the investigation but failed to disclose that fact, and (3) was acquainted with a trial witness (Denny Mason) but failed to disclose that fact because it would have incriminated the judge in the federal investigation.

Rippo, 368 P.3d at 743. App. 29. The court refused to reconsider its decision as to the first and third allegations because there "are no substantially different facts alleged now that would warrant an exception to the law-of-the-case doctrine with respect to our prior decision regarding these allegations." *Id.* at 743-44. App. 029-30.

As to the second allegation, the Nevada Supreme Court noted that Rippo proffered evidence showing that "as part of the sting operation, an unnamed chief or deputy district attorney worked with federal authorities to bring a fictitious case before the trial judge and that the judge saw a person wearing a Metro jacket when FBI agents executed a search warrant at his home." *Rippo*, 368 P.3d at 744. App. 030-31. However, the court rejected Rippo's argument because it was "not entirely clear that this new information established that the State was engaged in its own investigation of the trial judge or that there was a joint state/federal investigation as opposed to a federal investigation in which some state actors provided assistance to the federal authorities." *Id.* Even if there was, the court held that "the facts remain insufficient to establish judicial bias." *Id.*

The Nevada Supreme Court denied Rippo's petition for rehearing on May 19, 2016. App. 91-93. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

A. Certiorari Review is Warranted Due to the Nevada Supreme Court's Egregious Failure to Apply this Court's Settled Law to a Capital Case Involving Extreme and Unusual Facts that Created an Unacceptable Risk of Judicial Bias.

This Court will review a capital habeas case arising from a state court judgment when the "lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases). This Court has also reviewed the decisions of state habeas courts where there are extreme and unusual facts that were not previously available to the defendant at trial as a result of state action. *See id.* at 1007-08.[4] Here, the trial judge was being criminally investigated by one of the parties and the investigation concerned a case that the judge had fixed for one of the witnesses at Rippo's trial. The Nevada Supreme Court's failure to apply the appearance of impropriety standard to the facts of this case constitutes an egregious misapplication of this Court's judicial bias jurisprudence.

Moreover, this Court has intervened in cases presenting extreme and unusual facts when the state courts failed to consider the import of new material evidence that fundamentally altered the nature of a constitutional claim previously raised and rejected by the state court. *E.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1745-46 (2016).[5] In such circumstances, a state court's ruling preventing re-litigation of a claim risks blinding the court to the consideration of new material facts, which require a different outcome. *Cf. Wellons v. Hall*, 558 U.S. 220, 222 (2010) (*per curiam*) ("perfunctory consideration" by court of appeals "may well have turned on the District Court's

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[4] *E.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (noting state's strenuous objection "[t]hroughout all stages of this litigation" that it did not exercise peremptory challenges in a discriminatory manner, until petitioner obtained discovery in habeas proceedings "of the prosecution's file" which "belie[d] the State's claim"); *Smith v. Cain*, 132 S. Ct. 627, 629-30 (2012) (petitioner "obtained files from the police investigation in his case" during state post-conviction proceedings that showed that the state failed to disclose material impeachment information at trial).

[5] *See, e.g.*, *Cone v. Bell*, 556 U.S. 449, 459-61 (2009) (state courts conflated "the state-law disclosure claim Cone had raised on direct appeal with his newly filed *Brady* claim"); *Wellons v. Hall*, 558 U.S. 220, 221 (2010) (*per curiam*) (noting state court's finding that judicial bias claim re-raised in state habeas proceedings was denied as *res judicata*).

finding of a procedural bar"). The decision by the Nevada Supreme Court in Rippo's case warrants this Court's intervention as the state court's law-of-the-case ruling – which is a decision on the merits for the purposes of federal review – so far departed from the accepted and usual course of judicial proceedings as to warrant this Court's plenary consideration. *Cf.* SCR 10.

In the alternative, Rippo requests that this Court grant his petition, vacate the decision of the Nevada Supreme Court, and remand the case for further proceedings in light of this Court's recent decision in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). In *Williams*, this Court granted certiorari from a state court judgment in a habeas case where a state supreme court justice had previously participated in the decision to seek the death penalty in the petitioner's case as the District Attorney approximately thirty years earlier. *Id.* at 1905-09. The personal involvement of the state supreme court justice in authorizing the death penalty is analogous to (although not perhaps as troublesome as) the personal involvement of the trial judge in Rippo's case where the trial court was being investigated by the state in connection with the federal bribery investigation, and where the judge's disclosure of his relationship with Denny Mason would have incriminated him in the federal investigation. In both cases "there is an unconstitutional 'potential for bias.'" *Williams*, 136 S. Ct. at 1905 (citation omitted). As in *Williams*, the very evidence discounted by the Nevada Supreme Court in Rippo's case is the same evidence showing that the trial judge had an improper personal interest in the case that required the court's recusal. Rippo accordingly meets the standard set forth by this Court for a GVR in light of *Williams*: there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and [ ] it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. at 225 (citation omitted). *Cf., e.g., Flowers v.*

Mississippi, 136 S. Ct. 2157 (2016) (granting GVR on *Batson* claims in light of *Foster v. Chatman*, 136 S. Ct. 1737 (2016)).

A GVR in light of *Williams* is also appropriate given the extreme and unusual facts of Rippo's case for which he has never received an opportunity for factual development. *Cf., e.g., Collins v. Wellborn*, 520 U.S. 1272 (1997) (granting GVR in light of *Bracy v. Gramley*, 520 U.S. 899 (1997)). Rippo faces the same "procedural morass" that confronted the petitioner in *Wellons*. The trial court did not disclose the disqualifying facts at the time of trial, and, in fact, entirely misrepresented them, as did the prosecution. *See Wellons*, 558 U.S. at 221; *cf. Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 868 (1988) ("by his silence, [the trial court] deprived respondent of a basis for making a timely motion for new trial and also deprived it of an issue on appeal."). Rippo raised his judicial bias claim on direct appeal, but he was constrained by the non-existent record. When he re-raised his claim in the instant habeas proceeding with new evidence that completely undermined the factual basis for the Nevada Supreme Court's decision on direct appeal, his claim was rejected on the ground that it had been previously decided, without any consideration of whether the totality of the circumstances warranted an evidentiary hearing, in light of the false representations made at trial by the judge and the prosecution. A GVR is appropriate here, just as it was in *Wellons*, given the "unusual facts of the case" and the "petitioner's allegations and the unusual facts raise a serious question about the fairness of a capital trial." *Id.*

The Nevada Supreme Court's law-of-the-case ruling is reviewable by this Court as it was a decision on the merits of Rippo's judicial bias claim. This Court recently reiterated that a state court's finding of *res judicata* is not independent of federal law when the circumstances show that the claim was decided on the merits. *Foster v. Chatman*, 136 S. Ct. 1737, 1745-47 & n.4 (2016) (court will review issue either

"resting primarily on" or "influenced by" federal law) (citations omitted). "When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted." *Cone v. Bell*, 556 U.S. 449, 467 (2009). "To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is *ripe* for adjudication." *Id.* (emphasis in original). There is nothing in the Nevada Supreme Court's decision in Rippo's case to show that it was anything other than a decision on the merits of his judicial bias claim.[6] This Court accordingly has jurisdiction to decide the legal issue in this case.

B. The Nevada Supreme Court Failed to Properly Apply the Appearance of Impropriety Standard Because it Misapprehended the Nature of Rippo's Judicial Bias Claim As Limited to Compensatory Bias.

Rippo does not argue that the mere fact that a state court judge knows that he or she is the subject of a federal criminal investigation is sufficient by itself to require recusal under the Due Process Clause. Instead, he argues that the totality of the circumstances in his case, where the judge was being criminally investigated by one of the parties and where the investigation concerned the judge's conduct of fixing cases for one of the state's witnesses, required the judge's recusal. The instant case is one of those rare ones where the extreme and unusual facts present a constitutionally-intolerable risk of bias, and where recusal is required to address the resulting appearance of impropriety.

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[6] In Nevada, a capital habeas petitioner can overcome the state procedural default bars by showing that first state post-conviction counsel performed ineffectively. *See, e.g., Crump v. Warden*, 934 P.2d 247, 253-54 (Nev. 1997). The Nevada Supreme Court's finding that Rippo did not suffer prejudice from first state post-conviction counsel's performance was based on its antecedent holding that the judicial bias claim was without merit. *Rippo v. State*, 368 P.3d 743-45 (Nev. 2016); App. 030-32.

The Nevada Supreme Court's failure to consider the totality of the circumstances in this case affected its characterization of the species of judicial bias in Rippo's case. The state court was required to "first identify the 'essential elements' of [the bias] claim," *Bracy*, 520 U.S. at 904 (citation omitted), before it was in the position to apply the appropriate legal standard. According to the Nevada Supreme Court:

> Rippo's judicial-bias claim is not that the trial judge was biased against him specifically but more that the investigation and indictment created a 'compensatory camouflaging bias' – that the trial judge would be biased against criminal defendants at the time to curry favor with the agencies investigating him and prove that he was not soft on criminal defendants. *Bracy v. Gramley*, 520 U.S. 899 [ ] (1997) (describing similar claim of judicial bias).

Rippo, 368 P.3d at 744; App. 31. While the facts of Rippo's case share many similarities with *Bracy*, it is not necessarily because his case presents an issue of compensatory bias. In *Bracy*, the trial judge took a bribe in a case directly before he sat as the judge at the defendant's trial, another bribe directly after the trial, so the theory of compensatory bias was that the judge may have "compensated" for his bribe-taking by being partial against a defendant who did not bribe him. *Bracy*, 520 U.S. at 905. In those unique circumstances, this Court held that formal discovery was appropriate to determine whether the judge's act of appointing his former law partner and rushing the case to trial showed that the judge was biased in the defendant's case on a theory of compensatory bias. *Id.* at 906.

Rippo's case is somewhat similar to *Bracy* in that the trial judge here was accused of fixing cases for mafia figures and Rippo did not bribe him. However, the crux of Rippo's bias claim is that the trial judge found out just before the start of the trial that the Clark County District Attorney's Office and state law enforcement were

involved in the federal criminal investigation of him.[7] The judge knew that the office was involved in the sting operation and may reasonably have suspected that the state had even more involvement in the investigation. The judge may have also known that the District Attorney's Office was reviewing the cases that had previously come before the court to determine whether the judge had taken bribes from any other criminal defendants, as was reported in the news directly after Rippo's trial. The judge likely suspected as much when he recused himself from the government informant's (Terry Salem's) criminal case directly before Rippo's trial. The factual circumstances of a judge being criminally investigated by one of the parties is completely different here from the compensatory bias theory in *Bracy*, and the distinction requires a different legal analysis. *See Bracy*, 520 U.S. at 905 (noting that theory of compensatory bias can be "speculative" because "it might be equally likely that a judge who was 'on the take' in *some* criminal cases would be careful to at least appear favorable to *all* criminal defendants, so as to avoid apparently wild and unexplainable swings in decisions and judicial philosophy") (emphasis in original).[8]

A judge cannot maintain a constitutional level of impartiality when he or she is being criminally investigated by one of the parties to a case. This "Court's

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[7] The Nevada Supreme Court mentioned in a footnote that "the trial judge was not indicted until after Rippo's trial." *Rippo*, 368 P.3d at 744 n.19, App.031. However, this factual distinction does not change the temptation that would have existed for the average jurist "not to hold the balance nice, clear, and true" between the state and the accused. This finding also ignores Rippo's assertion that the judge had been offered a guilty plea directly before Rippo's trial started, which means that the court knew that an indictment against him was imminent.

[8] *See Bracy v. Schomig*, 286 F.3d 406, 411 (7th Cir. 2002) ("Our only explanation is that the unique nature of [the compensatory bias claim] may be why we need to look for actual bias"); *id.* at 421 (noting that in *Bracy*, this "Court [did] not regard the temptation to engage in compensatory bias as falling into the per se category, where proof of the temptation is enough to entitle a defendant to a new trial because the likelihood that the judge succumbed (perhaps quite unconsciously) is great") (Posner, J., concurring in part and dissenting in part, joined by Manion and Easterbrook, J.J.).

precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). The critical inquiry is whether "as an objective matter, 'the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009)). The circumstances presented in the instant case of a judge being criminally investigated by one of the parties is precisely the type of situation where an objective inquiry requires the court's recusal due to an appearance of impropriety. *Cf. In Interest of McFall*, 617 A.2d 707, 713-14 (Pa. 1992) (disqualification required when judge "faced potential prosecution by the same authorities that prosecuted defendants in her courtroom every day"). Such a situation is just as likely to compromise a judge's impartiality as the situation where the court stands to financially benefit from the case. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In fact, the average jurist may be even more affected by a threat to his or her life, liberty, and career than they would be to a mere financial benefit. *See McFall*, 617 A.2d at 712.[9]

The Nevada Supreme Court has recognized that a judge cannot be criminally investigated by one of the parties to a case in the context of state conflict of interest law when it held that a sitting judge cannot be supervised on disciplinary probation by the state attorney general's office while deputies of the office appear before the judge:

> This supervision is going on while the Attorney General's staff is presumably still trying cases before the supervised judge. [citation] This is a clear conflict of interest. Obviously, the Attorney General or the district attorneys over whom she has supervisory control, appear in an

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[9] There is no question that a juror who is being criminally prosecuted by one of the parties to a case is biased as a matter of law. *See, e.g., Brooks v. Dretke*, 418 F.3d 430, 434-35 (5th Cir. 2005).

> adversarial setting before the very judges she is investigating or is supervising under 'probation.'

Whitehead v. Nevada Comm'n on Judicial Discipline, 878 P.2d 913, 920-21 (Nev. 1994). "It is not difficult to see how the independence of judges might be compromised if a judge before whom a deputy attorney general was appearing felt threatened by the Attorney General's possession of confidential information, whether true or not, that might be harmful to the judge if released to the public." *Id.* at 919. Such circumstances are also fundamentally unfair to opposing parties litigating cases against deputies of the attorney general's office who are "prosecuting criminal and civil cases before judges who are under investigation and prosecution by the Attorney General in Commission proceedings, and [where there is] the potential for holding such judges actual or imagined 'hostages' without any awareness by opposing counsel." *Id.* at 916.

Moreover, a judge cannot maintain a constitutional level of impartiality in a case when he or she has a relationship with a state witness that is directly connected to a pending criminal investigation against the judge. *Cf. Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971) (recusal required where judge became "so enmeshed in matters involving [the defendant] as to make it appropriate for another judge to sit"). In the circumstances presented here, the average jurist would hesitate to disclose a relationship with the state's victim witness when a material part of the relationship between the witness and the judge was that the judge fixed a case for him. The fact that the judge falsely stated on the record that he did not know whether Metro was involved in the investigation, and the fact that he acquiesced in, and did not correct, the prosecutor's false representations regarding the extent of the Clark County District Attorney's Office's involvement in the federal investigation, is strong evidence that the judge was in fact affected by the State's involvement. *Cf. McFall*,

617 A.2d at 711 (recognizing that it is "a denial of the appellees' right to a fair and impartial tribunal for a judge to preside over their cases without revealing circumstances that raise questions as to her impartiality"). By denying this part of Rippo's claim on law-of-the-case grounds, the Nevada Supreme Court clearly ignored the import of his evidentiary proffer and therefore mischaracterized the species of judicial bias that exists in this case.

In such circumstances, the Nevada Supreme Court erred by holding that Rippo had to proffer more particularized evidence of the trial judge's actual bias in his case. "The issue is whether the judge was biased, regardless of how his bias may have manifested itself, or failed to manifest itself, in any defendant's case." *Cartalino v. Washington*, 122 F.3d 8, 10 (7th Cir. 1997). This Court required no such particularized proof of actual bias in *Tumey* as judicial bias constitutes structural error, *Tumey*, 273 U.S. at 535, and the state court erred by requiring more of Rippo in this case. As this Court has long recognized, "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted).

The totality of the circumstances here show that Rippo is entitled to relief from his convictions and death sentences based on the present record. While each of the circumstances above independently required the judge's recusal, in combination they absolutely demand it. However, this case comes before the Court in a procedural posture where Rippo has not received any factual development on his claim from the time of trial up to the present. Therefore, at the very least, his case should be remanded with instructions to permit formal discovery and factual development so that a decision can be rendered based on a fully developed record. *See, e.g., Bracy*, 520 U.S. at 908-10. Factual development is appropriate here because "the presumption [of impartiality] has been soundly rebutted." *Id.* at 909.

In the alternative, there is a reasonable probability that a GVR of this case to the Nevada Supreme Court in light of *Williams* will result in a remand to the trial court to create a fully developed record just as it did when this Court GVR'd *Wellons* to the Eleventh Circuit Court of Appeals. Such an approach will preserve this Court's scarce resources while also ensuring that Rippo receives a full and fair hearing on the extreme and unusual circumstances that are present in this case.

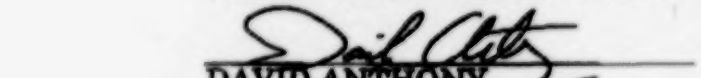
CONCLUSION

For the foregoing reasons, Rippo respectfully requests that this Court grant his petition for writ of certiorari and reverse the judgment of the Nevada Supreme Court. In the alternative, Rippo requests that this Court grant certiorari, vacate the decision of the Nevada Supreme Court, and remand for further proceedings in light of *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016).

DATED this 3rd day of October 2016.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada



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